Supreme Court, U.S.
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Nos. 88-707 and 88-708

In The

Supreme Court of the United States

October Term, 1988

EILEEN CONWAY,

Petitioner,

vs.

FIRST TRUST COMPANY OF NORTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a Petition for Writ of Certiorari to review a decision of the North Dakota Supreme Court affirming an Order of the Nelson County, North Dakota, Court allowing attorney's fees and Personal Representative's fees in a probate proceeding present any federal constitutional issue?

AFFILIATED CORPORATIONS

First Trust Company of North Dakota is a wholly-owned subsidiary of First Bank System, Minneapolis, Minnesota. Other subsidiaries include:

CMB Investment Counselors

FBS Agricultural Credit Corporation

FBS Brokerage Services, Inc.

FBS Card Services, Inc.

FBS Leasing Corporation

FBS Merchant Banking

FBS Mortgage Corporation

FBS Properties Management, Inc.

First Group, Inc.

First Insurance

Matrix Leasing International, Inc.

First Trust, Inc.

First Trust Company of Montana

There are First Bank banking subsidiaries at over 94 locations throughout the states of Minnesota, North Dakota, South Dakota, Montana, Washington and Wisconsin.

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OPINIONS BELOW

Mrs. Conway, the Petitioner, has not provided citations for the reported decisions of the North Dakota Supreme Court involving these estates. Those decisions, and their citations are: *Conway v. Parker,* 250 N.W.2d 266 (N.D. 1977); *In the Matter of Estates of Kjorvestad,* 287 N.W.2d 465 (N.D. 1980); *In the Matter of Estates of Kjorvestad,* 304 N.W.2d 83 (N.D. 1981); *First Trust Company of North Dakota v. Conway,* 345 N.W.2d 838 (N.D. 1984); *In the Matter of Estates of Kjorvestad,* 375 N.W.2d 160 (N.D. 1985); *In the Matter of Estates of Kjorvestad,* 395 N.W.2d 162 (N.D. 1986); *First Trust Company of North Dakota v. Conway,* 423 N.W.2d 795 (N.D. 1988).

JURISDICTION

The Final Judgment and Decision of the North Dakota Supreme Court which is the subject of this appeal was entered June 28, 1988. That decision reviewed a County Court order which dealt only with fees of the Personal Representative of the Estates of Guy Kjorvestad and Selma Kjorvestad and the fees of its attorney subsequent to the Final Report and Accounting. The decision and judgment of the North Dakota Supreme Court which affirmed the Findings of Fact, Conclusions of Law and Order of the Nelson County Court relating to the final account and distribution of the estates was entered October 1, 1985. A decision and judgment of the North Dakota Supreme Court dismissing the appeal of Amended Findings of Fact, Conclusions of Law and Order for Distribution, which included approval of additional fees incurred

as a result of the previous appeal, was entered October 28, 1986.

Mrs. Conway claims jurisdiction under the Fourteenth and Eighth Amendments to the United States Constitution relating to the handling and accounting of the estates. However, the only matter presented by this appeal is the approval of fees for the personal representative and its attorney. No jurisdictional statute is cited.

STATEMENT OF THE CASE

The estates of Guy and Selma Kjorvestad, a farm couple from the small rural community of Aneta, North Dakota, present the most litigated probate proceedings in the history of North Dakota. Guy Kjorvestad died on January 17, 1973. His wife, Selma, died a little more than a year later on May 14, 1974. Their two daughters, Lorraine Parker of Grand Forks, North Dakota, and Eileen Conway of Germantown, Tennessee, were named as joint executrices under the will of Selma Kjorvestad and were appointed jointly for the estate of Guy Kjorvestad.

The concept of joint administration, difficult even with mutual respect and patience, soon dissolved into rancor and dispute between the two daughters. Each daughter then retained her own lawyer. Under the procedures then in effect, appeals progressed from the county probate court to the District Court and from the District Court to the state Supreme Court. In January of 1977, the first appeal to the North Dakota Supreme Court was decided, relating to questions of representation

before the Internal Revenue Service, payment of attorneys' fees and a partial distribution to the heirs.

By May of 1979, due to the disputes and impasse in administration, the Nelson County Court ordered both of the executrices removed. That ruling was later sustained by the District Court and in September of 1980, the County Court of Nelson County appointed First Trust Company of North Dakota as successor representative under a supervised administration as provided by the Uniform Probate Code, as adopted and in effect in North Dakota on July 1, 1975.

In the meanwhile, an appeal of a previous order regarding payment of legal services progressed to the North Dakota Supreme Court which, in January of 1980 denied Mrs. Conway's appeal. In December of 1982 a hearing was had in Nelson County Court upon an interim reconstructed account by the successor Personal Representative and upon interim fees. Orders approving the account and the fees were entered.

On April 29, 1983, a hearing was held in Nelson County Court for approval of amended estate tax filings, payment of previously incurred legal and accounting services and payment of interim fees of the successor Personal Representative and its attorney. An order of approval was entered and, since the appeal procedure had been revised, the order was appealed by Mrs. Conway directly to the North Dakota Supreme Court. That order was affirmed in a decision of the Supreme Court dated February 23, 1984. In December of 1983, another County Court order was entered, after hearing, approving certain disbursements and fees. This order was also

appealed by Mrs. Conway, but the appeal was dismissed by the Supreme Court on motion.

On September 21, 1984, a hearing was held before County Judge Ronald Dosch at Lakota, North Dakota, upon a proposed Final Report and Account by the successor Personal Representative. Mrs. Conway appeared personally and presented extensive objections. Findings of Fact, Conclusions of Law and Order for Allowance of the Final Account and for distribution in each estate were entered by Judge Dosch on October 2, 1984. The orders were appealed to the North Dakota Supreme Court by Mrs. Conway. On October 1, 1985, the North Dakota Supreme Court affirmed the orders and directed that the fees of First Trust and its attorney arising from the appeal, as approved by the County Court, be assessed against Conway's share of the estates.

Upon remand to the County Court, First Trust Company submitted its affidavit as to fees together with proposed amended findings and orders to Judge Dosch with copies served upon Mrs. Conway. The amended findings and orders were approved and signed by Judge Dosch on December 5, 1985. Mrs. Conway appealed the amended orders to the Supreme Court and on October 28, 1986, the Supreme Court dismissed the appeal but held that Mrs. Conway was entitled to a hearing with respect to fees.

First Trust Company then petitioned the County Court for authorization and approval to pay unpaid and future attorney's and personal representative's fees. A hearing was held before County Judge Jonal Uglem on February 10, 1987, at Lakota, North Dakota. Mrs. Conway appeared and made her objections. On February 23, 1987,

Judge Uglem entered her order approving accrued fees and authorizing future payments to the Personal Representative and its attorney. Mrs. Conway appealed this order to the North Dakota Supreme Court. In its opinion and judgment dated June 28, 1988, the North Dakota Supreme Court affirmed the Order, except as to any provision for future fees arising from defending disciplinary complaints against the Personal Representative's attorney which were not sustained, and allowed double costs and attorney's fees of $250.00 against Mrs. Conway.

Mrs. Conway subsequently filed a Petition for Writ of Certiorari in this Court for review of the June 28, 1988, judgment of the North Dakota Supreme Court. She also has written the Clerk of the Nelson County Court requesting a docket file or sheet on the estates which the Clerk declined to provide. Mrs. Conway on April 4, 1988, apparently prepared a Petition to Inspect Probate Files addressed to the Nelson County Court. To our knowledge, the Petition has never been set for hearing, acted upon, nor is there any provision in the court rules or rules of procedure for such petition.

From 1975 through 1984 Mrs. Conway was represented by a succession of twelve different lawyers or law firms. From 1984 to the present she has proceeded *pro se*. She has also filed disciplinary complaints against each of the attorneys representing her sister and the successor Personal Representative. All of such complaints have been denied. She has had her objections heard before four different County Court Judges, two District Court Judges,

and nine different Justices of the five-member North Dakota Supreme Court.

SUMMARY OF ARGUMENT

Mrs. Conway's petition is a repetition of unsubstantiated claims and allegations made against participants in the judicial process over the past fourteen years. In the numerous hearings and appeals over that period of time, no substantial evidence of this "probate crime" and coverup has ever been provided.

There is no federal question for decision by this Court since the most recent appeal dealt only with approval of fees and sanctions for a frivolous appeal. The sanctions imposed, charging her with fees relating to a frivolous appeal were consistent with federal practice and mild in view of the case history. There are no equal protection or due process violations because Mrs. Conway was accorded full and multiple hearings upon her objections under the Uniform Probate Code and the rules of procedure applicable to civil actions in North Dakota.

ARGUMENT

1. Petitioner Presents no Claim of Substance.

It is difficult to frame an intelligent response to an argument which takes as its essential premise the corruption of the entire judicial system of the State of North Dakota. The initial response must be that the judges, lawyers, court personnel and parties involved are not

corrupt and Mrs. Conway has never presented credible evidence of what she consistently describes as "the probate crime of the century."

Justice Meschke of the North Dakota Supreme Court, in October, 1985, when the merits of the final account were actually before the Court, made the following summary of Mrs. Conway's claims:

> Without any references to the record, Conway's "statement of facts" rails against her sister ("manic crime spree;" "embezzled money;" "embezzled bonds, cash, bank money-orders, checks;" "forged" signatures; "illegally redeemed securities and illegally moved $100,668.68 in cash assets;" "looted four safe deposit boes [sic];" "destroyed . . . monthly bank statements to cover-up additional forgeries;" "destroyed all records;" and "embezzled approximately $39,000.00 from the estate"); rails against one prior attorney for the estate ("deceitfully misrepresenting himself;" "defied two court orders," "felonies, fraud, forgeries, theft, embezzlements and a tangled web of falsified records to cover-up the wrong-doing;" "10 years of trama [sic], threats, insults, verbal and non-verbal abuse inflicted" by him on her; his "ruthless, vicious interference;" "conspired;" "concealed;" acted "illegally;" "also practiced deceit;" and "cover-up [of] massive fraud and felonies committed against the estate."); rails against one of her own lawyers ("concocted a scheme;" "lied;" participating in a "fraudulent" report; "fraudulent accountimg" [sic] and a "fraud scheme.") and rails against a prior accountant ("falsified bank deposits to cover-up Parker's embezzlements;" "falsified grain sales;" and "falsified bank account ownership.")
>
> Her unsupported vilification extends to a county judge ("brutally assaulted Conway;" "cover up" of "irregularities;" "illegal court order;), a district judge

> ("[f]alse statements;" "illegal Amendment to Judgment . . . to cover-up the 'doctored' files and the payoffs made to cover up the fraud;") and a clerk of court ("disoriented, hysterical behavior").
>
> She proceeds with scathing accusations against First Trust and those associated with it. She rails that First Trust "breached their fiduciary duty," "committed perjury," "employed perjury, deception, misrepresentation and fraud to cover-up" assets and "committed perjury." She accuses an officer of First Trust of making "thirteen false statements . . . to cover-up" prior "illegal" activities of a lawyer for the estate, and accuses a lawyer for First Trust of "making sixteen false statements . . . to cover-up" such activities.
>
> None of these vituperations are supported by any references to the record. Thus, Conway's presentation is lacking in evidence though lengthy in vilification.

In the Matter of the Estates of Kjorvestad, 375 N.W.2d 160, 164 (N.D. 1985).

Vilification notwithstanding, the Supreme Court proceeded to a careful examination of the procedures followed and actions taken by the successor personal representative.

The reconstructed account for the administration of Mrs. Conway and her sister, the collection of assets, the accounting for assets and the compensation for First Trust and its attorney were all reviewed and found not legally wanting.

2. There is no Federal Question.

As contemplated by Rule 17, Sup.Ct.R., a writ of certiorari will be granted only for special and important

reasons. One of these reasons would be when a state court of last resort has decided a federal question in conflict with the decision of another state or a federal court of appeals. Another would be when a state court has decided an important question of federal law which is in conflict with a decision of this Court or which should be settled by this Court.

The decisions of the North Dakota Supreme Court in this case are simply interpretations of probate law under the statutes and civil rules of North Dakota. The major argument of Mrs. Conway revolves about whether procedures in the estates were governed by North Dakota statutes in effect before or after July 1, 1975.

No federal question was ever presented for decision by the Supreme Court of North Dakota.

There were three issues before the North Dakota Supreme Court: (1) Were the allowances of attorneys' fees and personal representative's fees clearly erroneous? (2) May the county court allow costs of defending unsubstantiated disciplinary complaints as a charge against Mrs. Conway's share of the estates? (3) Was the appeal frivolous, justifying an assessment of costs and fees against Mrs. Conway?

3. Sanctions for Frivolous Pleading and Litigation are Fully Justified.

If there is any cause for wonder about the history of these estates it is not that the North Dakota Supreme Court has applied extraordinary sanctions. Rather, the wonder is that the Court has applied so few and such

minor sanctions for litigation that has been, at least over the past four years, totally repetitive, frivolous and full of libelous allegations. Once the constraints of representation by a member of the bar were removed, Mrs. Conway returned again and again to her basic premise, that her sister and her sister's attorneys had stolen from the estates and everyone thereafter was covering up.

The Court proceeded under Rule 38 of N.D.R. App.Proc., which provides:

> If the court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, including reasonable attorney fees.

This rule follows closely Rule 38, Fed.R.App.P., applicable to the federal courts of appeal.

Recognizing the burden of frivolous litigation in an already overburdened judicial system, the Federal Civil Rules have increased the standards to be applied and the sanctions to be imposed. Under the most recent amendments:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or

> other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11, Fed.R.Civ.P.

These directives are consistent with sanctions for failing to make discovery. See Rule 37(b)(2), Fed.R.Civ.P. It is unlikely that a federal district court judge would have exercised the extreme patience displayed by the North Dakota Supreme Court.

4. This Extensively Litigated Probate Proceeding Presents no Equal Protection or Due Process Violation.

The equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error. *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). Mrs. Conway's claims of error in rulings by the County Court of Nelson County, as reviewed by the North Dakota Supreme Court, present matters well within the sound discretion of those judicial bodies.

Whatever procedures are fair, what state process is constitutionally due, what distinctions are consistent with equal protection, all depend on the particular situation presented. *Cohen v. Hulen*, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed. 156 (1961).

The Uniform Probate Code, as adopted in North Dakota and applied in these estates, is a product of the

respected National Conference of Commissioners on Uniform State Laws and has been adopted in at least sixteen states. Uniform Probate Code (U.L.A.), p.1 (1988 Supp.). It is far from an aberrant or illconceived piece of legislation.

The Constitution commits to the states the power to control administration of their citizens' estates. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *American Trust Co., Inc. v. South Carolina State Bd. of Bank Control*, 381 F.Supp. 313 (D.S.C. 1974).

It seems questionable that the "excessive fines" provision of the Eighth Amendment is applicable to the states through the Fourteenth Amendment. See *Collins v. Johnston*, 237 U.S. 502, 35 S.Ct. 649, 59 L.Ed 1071 (1915); Annot. 18 L.Ed.2d 1388, 1412. However, the same considerations of judicial discretion under the due process and equal protection clauses would apply. In addition, that provision is addressed to the criminal jurisdiction of the courts rather than the civil proceedings applicable here.

CONCLUSION

The petition for writ of certiorari to the North Dakota Supreme Court presents an interesting case study in how the judicial process in a probate proceeding may be extended, delayed, complicated and made expensive by a determined litigant with substantial resources. This case has already clogged the calendar of the Supreme Court of North Dakota for eleven years. It has no place on the calendar of the Supreme Court of the United States.

Dated: November 14, 1988.

Respectfully submitted,

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